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STATUS OF CONVENTIONS

Note by the Secretariat

Addendum

STATUS OF THE HAMBURG RULES

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INTRODUCTION

1. The United Nations Convention on the Carriage of Goods by Sea, 1978 ("Hamburg Rules") was adopted on 31 March 1978 at the universal diplomatic conference held at Hamburg.[1] 68 States voted for the Convention, three abstained and none voted against. Until 30 April 1979, the time limit for signature, 27 States had signed it. After twenty States had become party to it, the

[1] Published in United Nations Conference on the Carriage of Goods by Sea, Official Records, A/CONF.89/14 (Final Act of the Conference, A/CONF.89/13, annex I), United Nations, New York, 1981; Yearbook of the United Nations Commission on International Trade Law, Volume IX: 1978, part three, I, B; and in a brochure available from the Secretariat of the Commission.

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Convention entered into force on 1 November 1992. Since then two more States have acceded to it.

2. The initiatives that led to the preparation of the Convention were taken at about the same time in 1968 in the context of the United Nations Conference on Trade and Development (UNCTAD) and the United Nations Commission on International Trade Law (UNCITRAL). After initial consideration in the two organizations, UNCITRAL was eventually called upon by the General Assembly to perform the preparatory work, which culminated in the diplomatic conference at Hamburg.

3. The General Assembly, after previous similar calls, adopted on 9 December 1993 resolution 48/34, in which it invited all States to consider becoming parties to the Hamburg Rules, and requested the Secretary-General to continue to make increased efforts to promote wider adherence to the Convention.

4. The purpose of this note is to summarize the changes resulting from the entry into force of the Hamburg Rules so as to facilitate the Commission's considerations concerning steps to be taken to accelerate the process of adhesion to the Hamburg Rules.

A. Regime intended to be replaced by the Hamburg Rules

5. The purpose of preparing the Hamburg Rules was to establish a modern and fair liability system for the carriage of goods by sea. The new system was intended to replace the regime based on the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Brussels, 25 August 1924) ("Hague Rules").

6. The regime based on the Hague Rules is not uniform. Some States are party only to the original Hague Rules, while some others have adhered to the "Hague-Visby Rules", i.e., the Hague Rules as amended by the Protocol of 23 February 1968. In addition, a limited number of States are party to the Protocol of 21 December 1979 to the Hague-Visby Rules, which introduced Special Drawing Rights (SDR) for expressing the financial limits of the carrier's liability.

7. A further degree of disharmony in the regime based on the Hague Rules results from the fact that the manner in which States have incorporated the Hague or Hague-Visby Rules in their legislation has not been uniform in that in many cases the scope of application of the Rules has been expanded. Moreover, as noted below in paragraph 17, the divergent standards of conversion of the provisions of the Hague regime concerning the financial limits of liability has led to widely discrepant liability limits.

8. Additional uncertainty regarding the Hague regime stems from the fact that some States have modelled their legislation wholly or partly on the Hague Rules or Hague-Visby Rules without becoming parties to them. In recent years some States have adopted, and presently some other States are about to adopt, laws that combine elements from the Hague regime and the Hamburg Rules; those laws, however, do not follow a uniform approach in combining the two regimes.

9. For situations in which the Hague regime does not apply, transport documents often contain clauses ("Paramount clauses") according to which the Hague Rules or, less frequently, the Hague-Visby Rules apply as contractually agreed rules.

B. Some major differences between Hamburg and Hague regimes

10. The scope and purpose of this document do not permit a full description of the differences between the Hamburg Rules and the regime based on the Hague or Hague-Visby Rules. However, for the purposes of general information and orientation, some of the main differences are noted in the following paragraphs.[2]

Scope of application

11. The Hamburg Rules apply to all contracts of carriage by sea between two different States provided that the port of loading, the port of discharge or the place where the bill of lading or other transport document has been issued is located in a Contracting State. The Hamburg Rules apply irrespective of whether a bill of lading or other transport document has been issued.

12. By their terms, the Hague Rules apply only to bills of lading issued in a Contracting State. The Hague-Visby Rules apply to bills of lading relating to the carriage of goods between different States, provided the bill of lading is issued in a Contracting State, the carriage is from a port in a Contracting State, or the parties have agreed to the application of the Convention. The Hague and Hague-Visby Rules do not apply when a transport document other than a bill of lading is issued in connection with the carriage.

Period of responsibility

13. The mandatory liability regime of the Hamburg Rules covers the period from the time the carrier takes the goods in charge at the port of loading until the time the carrier delivers the goods at the port of discharge. Thus, the Hamburg liability regime extends beyond the actual carriage, to the extent the carrier keeps the goods in its charge in the port before they are loaded or after they are unloaded.

14. The mandatory liability regime of the Hague Rules and the Hague-Visby Rules commences when the goods are loaded onto the ship and ends when they are discharged from the ship. This means that the carrier's liability under the Hague regime does not apply beyond the defined limits even if the carrier has goods in its charge before they are loaded onto the ship or after they were unloaded from the ship.

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[2] More comprehensive studies of the differences are contained, for example, in the following publications: The economic and commercial implications of the entry into force of the Hamburg Rules and the Multimodal Transport Convention (document TD/B/C.4/315 (Part I), 31 December 1987); the explanatory note on the Convention prepared by the Secretariat of the Commission (document A/CN.9/306, 19 February 1988), reproduced in Yearbook of the United Nations Commission on International Trade Law, Volume XIX: 1988, part two, IV); United Nations Convention on the Carriage of Goods by Sea 1978 (Hamburg Rules), Explanatory Documentation prepared for Commonwealth Jurisdictions by Professor H.M. Joko Smart in association with the Commonwealth Secretariat, 1989; John O. Honnold, Ocean Carriers and Cargo; Clarity and Fairness - Hague or Hamburg?, Journal of Maritime Law and Commerce, Vol. 24, No. 1, January, 1993, pp. 75-109.

"Nautical Fault"

15. Under the Hague and Hague-Visby Rules the carrier is free from liability when the loss or damage arose from an act, even if it was a negligent act, in the navigation or in the management of the ship. The Hamburg Rules, in line with the international treaties governing the other modes of transport, do not exonerate the carrier from negligence in such cases.

Financial limits of liability

16. Under the Hamburg Rules, the liability of the carrier is limited to 835 Special Drawing Rights (SDR) per shipping unit or 2.5 SDR per kilogram of the goods, whichever is the higher.

17. The Hague and Hague-Visby Rules specify the financial limits in monetary units of gold value. In practice, however, the liability limits differ widely as a result of differing methods of conversion of those monetary units into national currencies. In some States the market value of gold is used as the standard of conversion while other standards are used elsewhere. Where the market value of gold is used, the resulting limits of liability are considerably higher than the limits specified in the Hamburg Rules.

18. The 1979 Protocol to the Hague-Visby Rules sets the limit at 666,67 SDR per shipping unit or 2 SDR per kilogram of goods, whichever is the higher.

Deck cargo

19. Under the Hague regime the carrier is not liable for cargo carried on deck under a bill of lading that states that the cargo is so carried. In practice, the carrier's liability in such cases is left to contractual stipulations, which, however, are not subject to the mandatory rules of an international treaty.

20. The Hamburg Rules, taking into account modern transport techniques, which often involve stowing containerized goods on deck, provide suitable rules for deck cargo.

Delay

21. The Hamburg Rules provide for a mandatory liability for delay in delivery of goods. The financial limit for such liability is two and a half times the freight payable for the goods delayed. The Hague and Hague-Visby Rules do not provide for liability for delay.

Liability of actual carrier

22. The Hamburg Rules, as do international conventions for the carriage of goods by air and the carriage of passengers by sea, govern the liability of both the "contractual carrier" (i.e. the carrier with whom the consignor concluded a contract for the carriage of those goods) as well as the liability of the "actual carrier" (i.e. a carrier whom the contractual carrier engaged to perform a part of or the whole carriage contracted for by the consignor). Essentially, the Hamburg Rules make the contractual carrier liable for the whole carriage, including the part of carriage performed by the actual carrier, while enabling the cargo owner to hold also the actual carrier liable for its part of the carriage.

23. The Hague and Hague-Visby Rules do not deal with the liability of the actual carrier who has not issued a bill of lading to the consignor. This means that under the Hague regime the contractual carrier has a possibility to include in the bill of lading a clause entitling the carrier to subcontract a part or even the whole voyage and at the same time excluding the liability for the subcontracted part of the voyage.

"Paramount clause"

24. According to the Hamburg Rules, the transport document must contain a statement that the carriage is subject to those provisions of the Hamburg Rules which nullify any stipulation derogating therefrom to the detriment of the shipper or the consignee. Furthermore, it is provided that the carrier must pay compensation to the claimant who has incurred loss as a result of the omission of that required statement. The Hague or Hague-Visby Rules do not contain a similar requirement.

Jurisdiction and arbitration

25. The Hamburg Rules have mandatory provisions on jurisdiction and arbitration, according to which the claimant, at its option, may institute an action in a court (or may initiate arbitration, if arbitration has been agreed upon) at one of the following places: the place of business of the defendant; the place where the transport contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; the port of loading; the port of discharge; or any other agreed place.

26. The Hague or Hague-Visby Rules do not contain rules on jurisdiction or arbitration. This has led to the common inclusion of clauses in bills of lading requiring any claim to be brought at the carrier's place of business. Since such clauses may be unfair towards the cargo owner, a number of national laws have established mandatory restrictions on such jurisdiction clauses.

C. Some problems caused by coexistence of Hamburg and Hague regimes

27. Until the Hague liability regime is replaced by the regime of the Hamburg Rules, conflicts of jurisdictions and practical problems will arise, in particular in voyages between States adhering to different regimes.

28. When the carriage is from a State party to the Hague Rules or Hague-Visby Rules to a State party to the Hamburg Rules, the liability regime will depend on where the action is brought. If it is brought in the State of the port of loading, the court will apply the Hague regime; if the transport document contains a clause providing for the applicability of the Hamburg Rules (above, para. 24), the effectiveness of the clause will depend on whether the State concerned has enacted the provisions on the scope of application of the Hague regime as mandatory law. If the action is brought in the State of the port of discharge, the Hamburg Rules will be applied.

29. In the case of the carriage from a State party to the Hamburg Rules to a State party to the Hague Rules or Hague-Visby Rules, the court in the State of the port of loading will apply the Hamburg Rules. The court in the State of the place of discharge may apply the Hague or Hague-Visby Rules if the State has extended the applicability of the Hague or Hague-Visby regime to

inbound cargo, which many States have done. If the Hague or Hague-Visby Rules have not been so extended, the court at the place of discharge will apply its conflict-of-laws rules to determine the applicable regime.

30. Several undesirable consequences arise from the possibility that a given dispute may fall within the jurisdiction of different States applying different regimes. One is that the claimant may choose to bring the action in a particular jurisdiction in order to obtain the applicability of a legal regime thought to be the most favourable to the claimant or merely to preempt the other party from bringing an action in another, less favourable jurisdiction. Such "forum shopping" is wasteful, might result in concurrent proceedings possibly with inconsistent decisions, and might lead to uncertainty in the recognition and enforcement of arbitral or court decisions.

31. Another possible consequence is that various parts of cargo carried in a single vessel are subject to different liability regimes, depending on the States in which the particular parts of the cargo were loaded or discharged, or where the documents evidencing the contracts of carriage for the different parts of the cargo were issued. Such mixing of regimes is undesirable from a managerial point of view, as, for example, it hinders the use of uniform transport documentation that would be in harmony with the underlying liability regime.

32. A further consequence is that, in the case of a chartered ship, the shipowner, who often does not know in advance where the charterer will employ the ship, does not know when it can be held liable as the actual carrier under the Hamburg Rules.

33. Yet another consequence is related to the assessment that, on balance, the users of transport services enjoy a better liability protection under the Hamburg Rules than under the Hague regime. Thus, a State continuing to be party to the Hague regime will increasingly be seen as maintaining a situation in which the carriers from that State are providing to the cargo owners using ports in that State a less favourable regime than to those foreign cargo owners who can rely on the Hamburg Rules.

34. The ability of parties themselves to avoid those consequences by stipulating the applicability of the Hamburg Rules is limited. One limitation is that P & I Clubs (mutual transport-liability insurance entities owned by the carriers), in the context of their efforts to block enactment or use of the Hamburg Rules, have declared that if a carrier voluntarily adopts the Hamburg Rules for a voyage to which the Rules do not compulsorily apply, the carrier's cover will be prejudiced. Another limitation arises from the fact that, with respect to certain limited but commercially important issues, the Hague liability regime is more favourable for the cargo owner than the Hamburg Rules. Since the minimum level of liability prescribed in the Hague regime is mandatory, the effectiveness of stipulations in favour of the Hamburg Rules may be called into question. For example, the provisions on liability for fire appear, as regards the burden of proof, more favourable for the cargo owner in the Hague or Hague-Visby Rules than in the Hamburg Rules. Another such case are the financial limits of liability, which, as noted above in paragraph 17, are lower under the Hamburg Rules than under the Hague Rules and Hague-Visby Rules in those States where the market value of gold is used as the standard of conversion of the limitation amounts.

CONCLUSION

35. The described problems will gradually cease to occur to the extent the disparate and to a significant degree outdated Hague regime is being replaced by the modern Hamburg Rules. The pace of that replacement, however, has been slow, apparently to a large extent due to viewpoints such as the following.

36. In many States, including States with sizeable merchant fleets, the opinion has been expressed that, while the Hamburg Rules constitute the most modern and optimal regime, adherence to the Hamburg Rules should be deferred until certain other States have adhered to the Rules. The usual argument is that legislative action should be postponed until the Hamburg Rules have been accepted by particular States with which the State in question maintains close maritime trade links. Such an attitude may have been the most important reason for the slow progress in the acceptance of the Hamburg Rules.

37. Some persons have raised the idea that, since the carriers in some countries oppose the adherence to the Hamburg Rules, an attempt should be made to revise the Hamburg Rules. It will be noted, however, that a revision would increase the disparity of laws by adding a new treaty to the existing ones without any assurance that uniformity of law would be achieved in that way. It should be recalled that the legislative process leading to the Hamburg Rules involved all the interest groups and a truly universal representation of States; during that process, all arguments were weighed, well-considered concessions and counter-concessions were made, and the result of the negotiations met, as noted above in paragraph 1, with a broadly-based approval. In view of those circumstances, it appears to be unwise to attempt to repeat the negotiations.

38. A further view, which has been directed to some States party to the Hague Rules or Hague Visby-Rules, is that, until the Hamburg Rules are widely adopted, those States, in order to modernize their law, may want to add to their existing legislation certain provisions based on the Hamburg Rules, to the extent they are not in conflict with the Hague Rules or the Hague-Visby Rules. As noted above in paragraph 8, some States have indeed adopted or are about to adopt laws combining the provisions of the Hague regime and the provisions of the Hamburg Rules. The serious problem with this approach is that it increases the disparity of laws to a level at which the international carriers and their customers cannot rely on an international treaty to ascertain their rights and obligations. Moreover, for States party to the Hague Rules or Hague-Visby Rules it may be open to debate as to whether a provision transposed from the Hamburg Rules to the Hague regime is in conflict with the international obligations arising from the Hague regime.

39. The above views are sometimes combined with strong lobbying campaigns against the Hamburg Rules which include arguments that are inaccurate, unproven or exaggerated.

40. It appears that, in order to accelerate the process of modernization and harmonization of the laws on carriage of goods by sea and to overcome the delaying effect of the above-mentioned viewpoints, a concerted and decisive action of States is necessary. The Commission may wish to consider how to achieve such a concerted action.